United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

M-37006

JAN 18 2001

Memorandum

To: Director, National Park Service

From: Solicitor

Subject: Great Sand Dunes National Park

I. Introduction

This memorandum responds to your request for advice on the steps necessary to (1) establish the Great Sand Dunes National Park ("National Park"), and (2) file an appropriate and timely water right claim for the Park in Colorado Water Court. Both of these steps are authorized by the Great Sand Dunes National Park and Preserve Act of 2000 ("Act"). P.L.106-530.

Great Sand Dunes is currently a national monument, first proclaimed by President Hoover in 1932 (Proclamation No. 1994, 47 Stat. 2506) and redefined and enlarged by Presidents Truman and Eisenhower in 1946 and 1956, respectively (Proclamation Nos. 2681 and 3138, 60 Stat. 1339 and 70 Stat. 631). The Presidents exercised authority granted by Congress in the Antiquities Act of 1906. 16 U.S.C. § 431. In 1978, Congress enlarged the national monument by statute. 92 Stat. 3474.

II. Establishment of the Park

Section 4 of the Act addresses how the Park is to be established:

> (a) ESTABLISHMENT - When the Secretary determines that sufficient land having a sufficient diversity of resources has been acquired to warrant designation of the land as a national park, the Secretary shall establish the Great Sand Dunes National Park in the State of Colorado, as generally depicted on the map, as unit of the national park system.

This provision is rather atypical National Park legislation in that the National Park is not

established upon enactment, but rather upon a condition subsequent.[1] The Senate Report explains the basis for this approach: "A large ranch, known at the Luis Maria Baca Grant No. 4, is located to the west of the existing national monument and contains key lands in the sand sheet and water resources that support the dune system." S. Rept. No. 106-479, 106th Cong, 2nd Sess. (2000), at 8 (emphasis added). The Senate Report goes on to note that the National Park "will include the existing national monument (which will be abolished when the national park is established), as well as adjacent lands located generally to the west, including the Baca properties and other State, private and Federal lands which would be acquired by or transferred to the National Park Service." Id. at 8 (emphasis added).[2]

The Baca properties are located to the north and west of the National Monument. The National Park Service map referenced in § 3(3) of the Act shows that the Baca properties would be a major addition to the lands that would become the National Park. Specifically, the map shows that the Baca lands are mostly earmarked, upon acquisition, for inclusion within the new boundaries of the National Park and Baca National Wildlife Refuge (Refuge) which are authorized by §§ 4 and 6 of the Act, respectively.

As you know, the Department is now negotiating for the purchase of the Baca properties. Eight and a half million dollars were made available for this purpose through Title VIII of the FY 2001 Interior and Related Agencies Appropriations Act, P.L. 106-291. It seems likely that acquisition of all of the Baca properties will cost considerably more than this, however. Therefore, several acquisition options are currently being considered, including acquiring a portion of the Baca properties in fee simple, or acquiring an undivided interest or a conservation easement over all the properties.

In moving forward with the acquisition, an important question that needs to be considered is what kind of legal interest in these properties would be sufficient for the Secretary to make the statutory finding necessary to establish the National Park ("sufficient lands having sufficient diversity of resources"). The answer, I believe, is found by considering the statute as a whole, including the findings Congress made, particularly the finding of § 2(6).

> [T]he designation of a Great Sand Dunes National Park, which encompass the existing Great Sand Dunes National Monument and additional land [i.e., non-federal as well as federal lands], would provide --
>
> (A) greater long-term protection of the geological, hydrological, paleontological,

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[1] It is not unique; for example, Everglades National Park was established under a similar statutory process (16 U.S.C. § 410), as was Mammoth Cave (16 U.S.C. §404).

[2] The legislative history is limited, and the Senate Report is the most authoritative guidance. See also 146 CONG. REC. S3921-22 (daily ed. May 11, 2000); S9990-93 (daily ed. October 5, 2000); and H10709-17, H10843-44 (daily ed. October 24, 2000).

scenic, scientific, educational, wildlife, and recreational resources of the area (including the sand sheet associated with the dune mass and the ground water system on which the sand dune and wetland systems depend); and

(B) expanded visitor use opportunities.

(emphasis added).

Designation must also further the mandates of the National Park Service Organic Act of 1916, 16 U.S.C. §§ 1 et seq, which is incorporated by reference in § 7(a)(2) of the Act. The 1916 Act provides that National Parks are established to "conserve the scenery and the natural and historic objects and wild life therein" but are also to "provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. See, e.g., Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819 (10th Cir. 2000).

In sum, the National Park may not be established until "sufficient lands having a sufficient diversity of resources" are acquired. A strong inference can be drawn from both the text and history of the statute that acquisition of most or all of the Baca properties within the proposed National Park boundary depicted in the referenced map is essential to the Secretary's determinations of "sufficiency." That is, the National Park should not be established until (a) the United States acquires an interest in essentially all the Baca properties within the National Park boundary; and (b) that interest is sufficient to manage and protect the resources they contain as well as provide for the kind of expanded visitor use opportunities contemplated by the statute. Acquisition of any lesser amount of Baca ranch lands, or lesser interest in those lands would not, in my view, meet the objectives of the legislation establishing the National Park.

III. A Water Right for the National Park

The legislation shows clearly that a concern with water was a primary motivation for expansion of the protected area and conversion of the National Monument into a National Park. Section 2 of the legislation contains congressional findings that, among other things:

identify as significant "the unique pulse flow characteristics of Sand Creek and Medano Creek that are integral to the existence of the dunes system;" (§ 2(2)(A));

determine that "other public and private land adjacent to the Great Sand Dunes National Monument . . . contributes to the protection of . . . the surface and ground water systems that are necessary to the preservation of the dunes and the adjacent wetland;" (§ (4)(B)(ii); and

determine that designating a National Park that encompasses both the existing National Monument "and additional land, would provide . . . greater long-term protection of the . . . resources of the area (including the sand sheet associated with the dune mass and the

ground water system on which the sand dune and wetland systems depend). . . ." (§ 2(6)(A)

Section 9 of the Act addresses water rights generally, and § 9(b)(2) addresses water rights for the Great Sand Dunes National Park, as follows:

> (2) WATER RIGHTS FOR NATIONAL PARK AND PRESERVE - In carrying out this Act, the Secretary shall obtain and exercise any water rights required to fulfill the purposes of the national park and the national preserve in accordance with the following provisions:
>
> > (A) Such water rights shall be appropriated, adjudicated, changed and administered pursuant to the procedural requirements and priority system of the laws of the State of Colorado.
> >
> > (B) The purposes and other substantive characteristics of such water rights shall be established pursuant to State law, except the Secretary is specifically authorized to appropriate water under this Act exclusively for the purposes of maintaining ground water levels, surface water levels and stream flows on, across, and under the national park and national preserve, in order to accomplish the purposes of the national park and the national preserve and to protect park resources and park uses.
> >
> > (C) Such water rights shall be established and used without interfering with -
> >
> > > (i) any exercise of a water right in existence on the date of enactment of this Act for a non-Federal purpose in the San Luis Valley, Colorado; and
> > >
> > > (ii) the Closed Basin Division, San Luis Valley Project.
> >
> > (D) Except as provided in sections (c) and (d), no Federal reservation of water may be claimed or established for the national park or the national preserve.

(emphasis added). See also S. Rept, supra at 11.

Although the effect of this subsection requires some understanding of general principles of water law, its meaning is clear enough. First, the legislation expressly, if rather subtly, disclaims the existence of a federal reserved water right. See § 9(b)(2)(D) ("[e]xcept as provided in subsections (c) and (d), no Federal reservation of water may be claimed or established for the national park . . .")[3] Were it not for this express waiver of a federal reserved water right, one

[3] The referenced subsections refer to water rights "established or acquired by the United States for" the Rio Grande National Forest (subsection (c)) and the Great Sand Dunes National

would be implied with the establishment of the National Park, and with the acquisition of lands into federal ownership that are included in the National Park. See United States v. New Mexico, 438 U.S. 696, 709 (1978).[4]

While Congress was not willing to expressly reserve additional water for the new Great Sand Dunes National Park, nor to allow water to be reserved by implication from silence in the legislation, Congress was not unmindful of the fact that water is important to the protection of the resources of the National Park. Indeed, as noted above, concerns about water were a primary motivation for this legislation. While not relying exclusively on federal law for the water protection necessary for the National Park, Congress did not take the opposite approach, which would have been to direct the United States to rely exclusively on state substantive and procedural law for securing the water necessary for National Park purposes. Cf. United States v. New Mexico, 438 U.S. at 701 ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.").

What Congress did instead in this legislation was both unusual and adroit. It directed the United States to file for needed water rights "pursuant to the procedural requirements and priority system of the laws of the State of Colorado." § 9(b)(2)(A). But Congress did not require the United States to conform to the substance of state law in making that filing. Instead, § 9(b)(2)(B) - after initially stating the principle that the "purposes and other substantive characteristics of such water rights shall be established pursuant to State law" – continues with an "except that" clause that "specifically authorize[s]" the United States to "appropriate water under this Act" to protect "ground water levels, surface water levels, and stream flows on, across, and under the national park . . . in order to accomplish the purposes of the national park . . . and to protect park resources and park uses."

This approach strikes a useful accommodation between state and federal law, by including elements of both. As the Attorney General of Colorado described it: "The bill contains sufficient language to protect existing water rights and provides that the Secretary shall obtain any new water right in accordance with federal and State law." CONG. REC. at H10714 (daily ed. October 24, 2000). It means that the National Park Service may appropriate and confirm, under the procedural rules of the State of Colorado, and in accordance with priority system of state law, a comprehensive water right to the ground and surface water necessary to fulfill the purposes and values of the National Park and Preserve, as those purposes and values are defined in the federal legislation.

Monument (subsection (d)).

[4] Existing implied federal reserved water rights of the Great Sand Dunes National Monument are safeguarded by this legislation, which provides that nothing in the Act "affects . . . the use, allocation, ownership, or control, in existence on the date of enactment of this Act, of any . . . water right . . .." Section 9(b)(1)(A).

What Congress has done here, then, is to preempt state water law in a limited way, by requiring conformity to state process and the state priority system, without limiting the water right to the substantive contours of state law. In so doing, Congress has exercised power long acknowledged to exist, and described specifically in a 1982 Opinion of the Office of Legal Counsel in the Department of Justice, as follows:

> The Supremacy Clause provides Congress ample power, when coupled with the commerce power, the Property Clause, or other grants of federal power, to supersede state law. The exercise of such power must be explicit or clearly implied, however, and federal rights to water will not be found simply by virtue of the ownership, occupation, or use of federal land, without more.

Federal "Non-Reserved" Water Rights, 6 Op. Off. Legal Counsel 328 at 383 (June 16, 1982) (hereafter, 1982 OLC Opinion). See also Solicitor Martz's Supplement to Solicitor's Opinion No. M-36914, 88 I.D. 253, 256 ("a federal right to use water in a manner not conforming to all substantive requirements of state law . . . may be founded on Federal supremacy if and where clearly mandated by Act of Congress"); id. at 257 (whether such a right is mandated by Congress "rests on the reasonable interpretation of the [statute] and its legislative history"). Cf. Solicitor Coldiron's Supplement to Solicitor's Opinion No. M-36914, 88 I.D. 1055, 1065 (September 11, 1981) (concluding that federal agencies may not "circumvent state substantive or procedural laws in appropriating water" except where water had been reserved under the reserved right doctrine). The 1982 OLC Opinion made clear that Solicitor Coldiron's Opinion should not be read for the proposition that Congress had no power to override state water law, only that Solicitor Coldiron had not identified an example of the exercise of such power:

> Solicitor Coldiron did not address the question of what evidence of congressional intent is necessary to overcome the presumption that state law applies. . . . [I]n Solicitor Coldiron's opinion, no existing federal land management statute contains a congressional directive of sufficient specificity to overcome the presumption of deference to state law, and that, unless and until Congress enacts [such a statute] . . . the only water rights available to federal agencies outside of state law are reserved rights or rights necessary to preserve the navigation servitude.

1982 OLC Opinion at 361. With the Great Sand Dunes legislation, we have a clear example of Congress exercising this power, albeit in a limited way.

An important advantage of this approach adopted by Congress, from the state perspective, is that it requires the National Park Service to put all other water users on notice, early on, of the character of its water rights claim. This is different from a federal reserved water right, which usually comes into existence by implication upon the creation of a federal reservation, but which does not then have to be filed in the state water law system. Indeed, it does not have to be formally claimed or adjudicated either until the United States chooses to bring an action in federal court to assert it and protect it, see, e.g., Cappaert v. United States, 426 U.S. 128 (1976), or, as is more usually the case, until the United States is joined in a state general stream

adjudication pursuant to the terms of the McCarran Amendment. See 43 U.S.C. § 666. Neither of these events may occur for many years after the federal reservation is made, and in the meantime other water users may lack notice of the character of the right. Another important advantage, besides better notice of the character of the claim, is that it facilitates administration of the claim through the state water rights system.

Other features of this water right also differ from a federal reserved water right. As suggested by the 1982 OLC Opinion, the basis for this right is the appropriation of water for some use specified in federal law, rather than a reservation of land. The appropriation date is the date the water use is initiated, and its measure is the amount of water reasonably necessary for that use. See 1982 OLC Opinion at 357. Here the water use is specified by the Act, and does not entail any artificial diversion of water, but occurs with the identification of the instream flows and groundwater levels necessary to fulfill the purposes of the Great Sand Dunes National Park.

Under the Supremacy Clause, the state water court is bound to follow these elements of federal law concerning this water right:

> In the exercise of its constitutional authority under the Commerce, Property, or General Welfare clauses, or under its treaty and war powers, Congress has the power to authorize the appropriation of unappropriated water by federal land management agencies. If Congress exercises that power, by operation of the Supremacy Clause such an exercise preempts inconsistent state laws.
>
> The question, therefore, is not generally whether Congress has the power to establish federal rights to unappropriated water, but whether it has exercised that power.

1982 OLC Opinion, at 362.[5] I believe Congress has clearly exercised that power here, for the limited but important objective of determining the purposes for which a water right may (under the procedures and in accordance with the priorities of Colorado state water law) be obtained for Great Sand Dunes National Park. By authorizing the appropriation of a water right for these purposes by the National Park Service, for example, Congress has preempted Colorado law to the extent that it limits the ownership and enforcement of such a water right to the Colorado Water Conservation Board. See Colo. Rev. Stat. § 37-92-102(3). This approach reflects, in other words, a determination that the National Park Service is not to be bound by whatever substantive limits might exist in Colorado state water law on the purposes for which the National Park Service may appropriate water necessary to protect the National Park. Further, although the Colorado Water Court has jurisdiction to make the initial determination of the National Park Service's water right, its determination of the sufficiency of that right to carry out the purposes of

[5]Although the 1982 OLC Opinion is a very helpful framework for understanding the nature of the water right authorized for the Great Sand Dunes National Park, we are not prepared to say here that all the discussion in that lengthy opinion controls all aspects of the particular water right enacted by Congress and addressed in this memorandum.

the federal legislation is a question of federal law, and ultimately would, if necessary, be reviewable in the Supreme Court of the United States. See, e.g., Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 571 (1983).

IV. Next Steps Regarding the Water Right Filing

The last set of questions that must be addressed involves determining just when the United States may file a water right claim for the National Park in Colorado Water Court and what the priority date would be.

The first issue is whether the United States may file a claim for this right immediately, before the Park is proclaimed, or whether instead it must await the creation of the National Park. This seems to me a mixed question of federal and state law, involving an examination both of what Congress contemplated in the legislation regarding water rights and the National Park's creation, and of what Colorado water law requires in terms of filing an application to confirm a water right. On the federal side of the issue, it is clear that the water rights under discussion here are, under the legislation, to "fulfill the purposes of the national park," yet, as discussed earlier, some steps have to be taken before the National Park can be created. Also, more information needs to be developed about the water needs of the Park. On the state side of the issue, Colorado has a system of water right applications that allows for the filing of what are called "conditional" as opposed to "absolute" water rights. The Colorado Supreme Court has explained:

> A conditional water right is defined by the Act as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such right is to be based." § 37-92-103(6) 15 C.R.S. (1990). A conditional water right "encourages development of water resources by allowing the applicant to complete financing, engineering, and construction with the certainty that if its development plan succeeds, it will be able to obtain an absolute water right." Public Service Co v. Blue River Irrigation Co., 753 P.2d 737, 739 (Colo. 1988). We have held that "conditional water rights decrees are designed to establish that the 'first step' toward an appropriation of a certain amount of water has been taken and to recognize the relation back of the ultimate appropriation to the date of that first step." City of Aspen v. Colo. River Water Conservancy Dist., 696 P.2d 758, 761 (Colo. 1985).

City of Thornton v City of Fort Collins, 830 P.2d 915, 924 (Colo. 1992).

Our examination of Colorado water law does not reveal a clear answer as to whether, on the facts before me, a conditional water right could be filed under Colorado law. The question is whether enactment of the federal law calling for and contemplating the creation of the National Park, especially when combined with the current availability of some federal funds for the land acquisition necessary to designate the National Park, may meet the minimum requirements for the filing of a conditional water right under Colorado law.

Until we explore the issue further, I would urge caution. While it is arguable that the claim of

water for the National Park to be created in the future qualifies for conditional status under the Colorado law, the water right here is unusual because of its mixed federal-state character. It would not be helpful to its confirmation if there were a side debate on whether a conditional right filing was appropriate.

On the other hand, it is in the interests of the United States to file as soon as possible in order to make more secure an early priority date. In Colorado, each year constitutes a separate adjudication, so that water rights adjudicated in one year generally will be senior to all water rights adjudicated in the subsequent year, regardless of the appropriation date on which the use of the water was initiated. Colo. Rev. Stat. § 37-92-306. This raises the question whether, if the United States does not file the claim until sufficient interest in the Baca properties is acquired and the National Park is established, we may nevertheless claim an appropriation on the date of enactment of the Great Sand Dunes National Park and Preserve Act (November 22, 2000). Because the federal legislation specifically subjects the water right to the "priority system of the laws of the State of Colorado," we turn to Colorado law on the subject. The Colorado Supreme Court has suggested that an early priority date may be established if the applicant can show the "concurrence of the intent to appropriate water for application to beneficial use with an overt manifestation of that intent through physical acts sufficient to constitute notice to third parties." City of Aspen v. Colorado River Water Conservancy Dist., 696 P.2d 758, 761 (Colo. 1985). The court has also said that "formal acts" such as resolutions or official decisions may constitute such overt acts so long as they manifest the necessary intent to appropriate water to beneficial use, demonstrate the taking of a substantial step toward the application of water to beneficial use, and constitute notice to interested parties of the nature and extent of the proposed demand on the water supply. City of Thornton v City of Fort Collins, 830 P.2d 915, 924-27 (Colo. 1992). Given that the determination of what constitutes a "first step" sufficient to establish a priority date is done on an ad hoc basis, Elk-Rifle Water Co. v. Templeton, 484 P.2d 1211 (1971), it is impossible to conclude with any certainty that the facts here would justify such a relation back. Given the need reflected in the statute and its legislative history to protect the surface and ground water resources associated with the Great Sand Dunes ecosystem, however, we believe a strong argument can be made that enactment of the Great Sand Dunes legislation manifested the necessary intent to appropriate, and provided adequate notice of its scope and character. Still, the issues discussed above about establishment of the National Park and its water needs could lead to questions of whether a sufficient specific intent to put water to use has been formed and acted upon by the United States.

The final question is what the United States might do in the meantime to protect its interests if it does not file for a water right in Colorado Water Court until the National Park is established. For one thing, the National Park Service should proceed forthwith to develop the information about the National Park's water needs for the filing it will eventually make in Colorado Water Court. But there is a further question; namely, whether the United States, in anticipation of the eventual establishment of the National Park, may file protests to any claims that might be filed by others to appropriate surface or ground water in the area, if the United States believes such appropriations would adversely impact the National Park once established. Our examination of Colorado water law suggests the answer is yes, that the United States may file such protests to

protect the future National Park's interests. See, e.g., FWS Land & Cattle Co. v. State, 795 P.2d 837, 839 (Colo. 1990) ("[O]wnership of a decreed water right is not a necessary requirement" for participation in a water court proceeding.); see also Colo. Rev. Stat. § 37-92-302(1)(b), which allows "any person" to file a statement of opposition.

If you have any questions regarding this matter, please do not hesitate to contact my office.

I concur:

Secretary of the Interior

1/18/01
Date